IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: JOEL D. JOSEPH :

JOEL D. JOSEPH :

v. : Civil Action No. DKC 2003-2755

:

U.S. TRUSTEE

:

MEMORANDUM OPINION

This case is before the court on appeal from the decision of United States Bankruptcy Judge Keir, dismissing with prejudice Debtor Appellant Joel Joseph's Chapter 11 bankruptcy filing. Oral argument is deemed unnecessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. *See* Fed.R.Bankr.P. 8012. For the reasons that follow, the court will affirm the bankruptcy court's dismissal with prejudice.

I. Background

The following facts are uncontroverted. A foreclosure action of Debtor Appellant Joel Joseph's property was prosecuted by Appellee U.S. Trustee under a deed of trust securing a loan to Ocwen Federal Savings Bank. A foreclosure sale was conducted and the property "struck down" to the highest bidder who executed a contract to purchase; that highest bidder was Debtor.

The foreclosure sale was ratified, but Debtor failed to perform under the purchase contract and defaulted thereupon. The Circuit Court for Montgomery County entered an order to resell the property at the risk of the defaulted Debtor. A subsequent re-auction of the property occurred and the property was struck down to a new third-party purchaser.

The bankruptcy court concluded that Debtor did not hold any interests in the property which could be reorganized in this Chapter 11 bankruptcy case, at the time Debtor filed the petition, and thus there existed "no legitimate purpose" for this case to proceed. *In re Joseph*, 298 B.R. 554, 557 (Bankr.D.Md. 2003). The bankruptcy court granted Appellee's motion to dismiss the case with prejudice, pursuant to 11 U.S.C. § 1112(b), ruling that Debtor had filed the bankruptcy petition

in "bad faith." *Id.*[1] Debtor subsequently filed the instant appeal in this court.

II. Standard of Review

On appeal from the bankruptcy court, the district court acts as an appellate court and reviews the bankruptcy court's findings of fact for clear error and conclusions of law *de novo*. *See Canal Corp. v. Finnman* (*In re Johnson*), 960 F.2d 396, 399 (4th Cir. 1992); *Travelers Ins. Co. v. Bryson Prop., XVIII* (*In re Bryson Prop., XVIII*), 961 F.2d 496, 499 (4th Cir.), *cert. denied*, 506 U.S. 866 (1992). Thus, this court will review the bankruptcy court's ultimate determination that the bankruptcy filing was in bad faith "as one of fact subject to the clearly erroneous

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[1] Section 1112(b) of the Bankruptcy Code provides, in pertinent part:

> Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including––
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> (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
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> (2) inability to effectuate a plan;
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> (3) unreasonable delay by the debtor that is prejudicial to creditors.

11 U.S.C. § 1112(b).

standard." *Carolin Corp. v. Miller*, 886 F.2d 693, 702 (4th Cir. 1989). Similarly, the findings supporting the bankruptcy court's dismissal with prejudice are also "factual determinations that must be upheld unless clearly erroneous." *In re Hollis*, 150 B.R. 145, 147 (D.Md. 1993).

III. Analysis

The bankruptcy court, under § 1112(b), enjoys "substantial discretion to dismiss a Chapter 11 case in which the debtor files an untenable plan of reorganization." *Toibb v. Radloff*, 501 U.S. 157, 165 (1991). Dismissal of a case under § 1112(b) must be "for cause," which requires a showing of "subjective bad faith on the part of the debtor, in that the motive for filing the Chapter 11 petition was to abuse the reorganization process, coupled with an objective element that reorganization is in fact unrealistic." *In re Superior Siding & Window, Inc.*, 14 F.3d 240, 242 (4th Cir. 1994) (citing *Carolin Corp.*, 886 F.2d at 700-02)).

To support its decision, the bankruptcy court explained that, after the failure of his first bankruptcy case, "Debtor improperly filed a case in the name of Debtor's minor son in an attempt to circumvent the bar against refiling imposed by Congress under 11 U.S.C. § 109(g)." *In re Joseph*, 298 B.R. at 557. Following dismissal of that second case and the

foreclosure, discussed *supra*, Debtor filed the instant case "in an attempt to spring board back into rights no longer held by Debtor." *Id.* Based on the record, the court is satisfied that the bankruptcy court's ultimate finding of bad faith was not clearly erroneous and therefore its decision to dismiss Debtor's case with prejudice must be affirmed.

Appellant argues that a recent decision by the Court of Special Appeals of Maryland, *White v. Simard*, calls into question Judge Keir's determination that he had no interest in the property at the time he filed bankruptcy. Specifically, the court stated:

> We perceive a lack of clarity in the Maryland cases as to what happens to a defaulting purchaser's equitable title after a resale is ordered. *Compare Werner* [*v. Clark*], 108 Md. [627] at 633, 71 A. 305 [(1908)](order for resale is revocation of the order confirming the first sale) with *Continental Trust Co. [v. Balto. Refrigerating & Heating Co.*], 120 Md. [450] at 456, 87 A. 947 [(1913)] (suggesting that equitable title held by first purchaser entitles him to surplus at second sale, and viewing resale as enforcement of bidder's contract at first sale).

White v. Simard, 152 Md.App. 229, 243, 831 A.2d 517, 526 (2003), *cert. granted on other grounds* (Md. Dec. 18, 2003). Judge Keir held that Appellant's rights as mortgagor were terminated at the conclusion of the first auction, and that his default terminated

his rights as holder of the equitable title. Ultimately, he concluded that it would not matter whether the second sale was ratified, because in neither event would it "restore to the Debtor any *in rem* interest in the property." *In re Joseph*, 298 B.R. at 557. Nothing in *White v. Simard* alters that conclusion. Any interest Appellant may have if there is surplus from the second sale does not alter the fact that he has lost forever any *in rem* interest he had in the property and that his default and subsequent reauction deprived him of the right to try to purchase the property. Thus, the conclusion of objective futility in filing for reorganization, along with the uncontested finding of subjective wrongful intent, fully justifies the finding of bad faith and the consequent dismissal.

IV. Conclusion

For the foregoing reasons, the court will affirm the bankruptcy court's decision to dismiss the case with prejudice. A separate Order will follow.

_____/s/_____
DEBORAH K. CHASANOW
United States District Judge
January 8, 2004